

**United States Small Business Administration  
Office of Hearings and Appeals**

SIZE APPEAL OF:

White Hawk/Todd, A Joint Venture

Appellant

Re: DMS-All Star Joint Venture

Appealed from  
Size Determination No. 6-2008-033

SBA No. SIZ-4888

Decided: February 7, 2008

**REMAND ORDER**

**I. Jurisdiction**

This appeal arises from a December 28, 2007 letter from the Small Business Administration's Office of Government Contracting, Area VI Office (Area Office) dismissing the size protest of White Hawk/Todd, A Joint Venture (Appellant), for lack of standing and specificity. Besides finding a lack of standing and specificity, the Area Office also concluded it was not permitted to review certain aspects of Appellant's protest relating to the eligibility of the DMS-All Star Joint Venture (DMS JV) to submit an offer as an approved 8(a) joint venture.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA.

**II. Issues**

Whether the Area Office made a clear error of fact or law when it dismissed Appellant's size protest for lack of standing and lack of specificity.

Whether the Area Office must review a mentor-protégé agreement for compliance with SBA's regulations when raised in a size protest.

### III. Background

#### A. Findings of Fact

1. On March 9, 2007, the U.S. Department of the Army, Ft. Sam Houston, Texas (Army) issued RFP No. W9124J-06-R-0031 (RFP) for a Job Order Contract (JOC) at Ft. Sill, Oklahoma as a total 8(a) competitive small business set-aside for 8(a) contractors located in Oklahoma.

2. The Contracting Officer (CO) designated North American Industry Classification System (NAICS) code 236220, Commercial and Institutional Building Construction, as the applicable NAICS code for this procurement, with a corresponding \$31 million annual receipts size standard. Final proposal revisions were due on April 27, 2007.

3. On November 30, 2007, the CO notified unsuccessful offerors, including Appellant, of award to DMS-All Star Joint Venture (DMS JV), a joint venture comprised of Diversified Maintenance Systems, Inc. (DMS) and All Star Services Corporation (All Star).

4. The SBA approved a mentor-protégé agreement between All Star (mentor) and DMS (protégé) on January 12, 2006. Their last annual review was completed June 22, 2007, when their Mentor-Protégé Agreement was approved for another year.

5. On December 7, 2007, White Hawk/Todd, A Joint Venture (Appellant) filed a size protest. Appellant alleged DMS and All Star were not operating as joint venturers under an approved mentor-protégé agreement at the time of proposal submission, April 27, 2007. Appellant asserted All Star violated 13 C.F.R. § 124.520(b)(2) by attempting to simultaneously act as a mentor of two protégés in direct competition with each other. Moreover, Appellant contended that DMS does not qualify as a protégé under 13 C.F.R. § 124.520(c) because (1) DMS is not in the developmental stage of 8(a) program participation; (2) DMS has received an 8(a) contract; and (3) DMS's size is more than half the size standard corresponding to its primary SIC Code. Accordingly, Appellant alleged that without a legitimate mentor-protégé relationship, DMS and All Star are affiliates and DMS JV is other than small for the instant procurement. Finally, Appellant argued that DMS JV failed to maintain a bona fide place of business in Oklahoma as required by the solicitation.

6. On December 27, 2007, the CO forwarded the protest to the Small Business Administration (SBA) Office of Government Contracting - Area VI in San Francisco, California (Area Office).

7. Appellant's joint venture agreement was not approved by SBA's Oklahoma District Office's Business Development Servicing Office.

8. The Record contains no evidence that the CO eliminated Appellant from the competition, for any reason, before announcing award of the contract to DMS JV.

### B. The Size Determination

On December 28, 2007, the Area Office issued Size Determination No. 6-2008-033 (size determination), dismissing Appellant's size protest for lack of standing because Appellant's joint venture agreement was not approved by its 8(a) Business Development Servicing Office. *See* 13 C.F.R. §§ 121.1001(a)(2), 124.513(e). Additionally, the Area Office dismissed Appellant's protest for lack of specificity under 13 C.F.R. § 121.1007.

However, the Area Office then proceeded to partially analyze the merits of Appellant's protest. Specifically, the Area Office addressed the protest allegation that DMS JV did not have an approved SBA Mentor-Protégé Agreement at the time of proposal submission. The Area Office found that the SBA approved a Mentor-Protégé Agreement between DMS and All Star on January 12, 2006, prior to the April 27, 2007 proposal submission deadline. Further, DMS and All Star's joint venture agreement was approved prior to award in accordance with 13 C.F.R. § 124.513(e). With regard to Appellant's protest allegation that All Star and DMS do not qualify as a mentor and protégé, respectively, the Area Office found the protest allegation beyond the scope of a size protest.

### C. The Appeal

On January 14, 2008, Appellant appealed the Area Office's dismissal of its size protest. Appellant argues it has standing to submit a size protest because its proposal was not eliminated by the CO. *See* 13 C.F.R. § 121.1001(a)(2)(i). Appellant concedes that on December 12, 2007, the SBA "refused to review [Appellant's] joint venture agreement" because Appellant allegedly violated 13 C.F.R. § 121.103(h) by submitting more than three offers as a joint venture over a two year period. Appeal, at 2. However, Appellant argues that SBA's decision not to review its joint venture agreement was arbitrary and capricious and should not vitiate its standing to file a size protest. Appellant also notes that it has filed suit in federal district court for declaratory relief based on SBA's decision not to review its joint venture agreement.

Next, Appellant asserts that its size protest was sufficiently specific under 13 C.F.R. § 121.1007. Appellant contends its protest showed that All Star violated 13 C.F.R. § 124.520(b)(2) by attempting to simultaneously act as a mentor of two protégés in direct competition with each other. Moreover, Appellant contends that DMS does not qualify as a protégé under 13 C.F.R. § 124.520(c) because (1) DMS is not in the developmental stage of 8(a) program participation; (2) DMS has received an 8(a) contract; and (3) DMS's size is more than half the size standard corresponding to its primary SIC Code. Accordingly, Appellant requests that OHA sustain the size protest or remand the case to the Area Office for a size determination.

### D. DMS JV Response

On January 29, 2008, DMS JV filed a Response urging OHA to dismiss the appeal. DMS JV argues Appellant did not have standing to protest DMS JV's size because Appellant is not an interested party under 4 C.F.R. § 21.0(a)(1). Specifically, DMS JV asserts that each joint venture offeror had to have a pre-approved joint venture agreement. DMS JV asserts that

because Appellant's joint venture agreement was disapproved, it was not an interested party with standing to file a size protest.

Notwithstanding Appellant's lack of standing, DMS JV then argues that Appellant's protest assertion that DMS JV did not have an approved joint venture agreement is false. DMS JV then counters Appellant's other protest allegation that DMS JV did not have a bona fide office in Oklahoma by providing its Oklahoma address, although noting that the issue is not within the jurisdiction of a size determination.

Finally, DMS JV asserts that the remainder of Appellant's appeal raises issues that were not before the Area Office and therefore are beyond the scope of the Record. DMS JV disputes the merits of Appellant's allegations by noting that annual receipts size standards are averaged over a period of years and are based exclusively on actual gross receipts; the potential value of contracts is irrelevant. DMS JV also argues that Appellant's allegation of an improper mentor-protégé relationship is baseless. DMS JV asserts 13 C.F.R. § 124.520(b)(2) merely provides that "generally" a mentor will have no more than one protégé at a time.

#### IV. Discussion

##### A. Timeliness

Appellant filed the instant appeal within 15 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(1).

##### B. Standard of Review

Appellant must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314. I will disturb the Area Office's size determination only if, after reviewing the Record and pleadings, I have a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

##### C. The Merits

###### 1. Standing

Standing to initiate size protests is governed by 13 C.F.R. § 121.1001. This regulation provides that for competitive 8(a) contracts, "[a]ny offeror whom the contracting officer has not eliminated for reasons unrelated to size" has standing to file a size protest. 13 C.F.R. § 121.1001(a)(2)(i). This regulation requires a contracting officer to take an active step to eliminate an offeror.

OHA has held 13 C.F.R. § 121.1001 gives standing to businesses whose successful protest would enable them to compete in the procurement. *Size Appeal of Global McKissack Partners, LLC*, SBA No. SIZ-4807 (2006) (citing 67 Fed. Reg. 70,339, 70,345 (Nov. 22, 2002)). Thus, the regulation denies protest standing to offerors who have been eliminated for reasons

unrelated to size since they would be unable to compete for award even if their protest was successful. Conversely, the regulation enables firms eliminated based on size to file size protests since they would be eligible to compete if the protest is successful and the contracting officer re-solicits the procurement on an unrestricted basis.<sup>1</sup> *Id.* at 4.

Appellant's joint venture agreement was not approved by the SBA's Oklahoma District Office's Business Development Servicing Office. Accordingly, the Area Office found Appellant lacked standing to submit a size protest "because its offer was not considered for reasons other than size, and therefore it no longer has an economic interest in the outcome of this award." Size Determination, at 1.

The Record does not support the Area Office's finding that Appellant's offer was not considered by the CO. Instead, the Record contains no evidence the CO did anything to eliminate Appellant from consideration, *i.e.*, there is no evidence the CO refused to consider Appellant's offer because of reasons unrelated to its size, or for any reason at all. For example, had the CO informed Appellant that she would not consider Appellant because it was not in the competitive range or because it was not responsive, that would be sufficient to deny Appellant standing. Similarly, if the CO had found Appellant not to be responsible and requested a Certificate of Competency (COC) determination, that too could result in a lack of standing if SBA were to deny the COC.

Although the Record seems to show Appellant lacks eligibility to be awarded a contract arising from the RFP, Appellant's eligibility is not the issue. Instead, standing under 13 C.F.R. § 121.1001(a)(2)(i) is determined by whether the CO eliminated Appellant, not by whether Appellant was an eligible offeror.

## 2. Size Protest Specificity

The regulation governing the content of a size protest provides, in relevant part:

A protest must include specific facts. A protest must be sufficiently specific to provide reasonable notice as to the grounds upon which the protested concern's size is questioned. Some basis for the belief or allegation stated in the protest must be given. A protest merely alleging that the protested concern is not small or is affiliated with unnamed other concerns does not specify adequate grounds for the protest. No particular form is prescribed for a protest. Where materials supporting the protest are available, they should be submitted with the protest.

Non-specific protests will be dismissed. Protests which do not contain sufficient specificity will be dismissed by SBA....

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<sup>1</sup> For non-competitive 8(a) procurement, however, a concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small. 13 C.F.R. § 121.1001(a)(1)(iv). This limitation is inapplicable to the instant case as the solicitation is a competitive 8(a) procurement.

13 C.F.R. § 121.1007(b), (c).

In determining the sufficiency of protests, OHA has focused on (1) whether the protest was sufficiently specific to provide notice of the grounds upon which the protestor was contesting the challenged firm's size; and (2) whether the protest included factual allegations as a basis for these grounds. *Size Appeal of Carriage Abstract, Inc.*, SBA No. SIZ-4430, at 6 (2001) (holding challenger's protest was sufficiently specific in that the protest asserted that the challenged firm was other than small, included the grounds for the challenge, and incorporated factual allegations to support its allegations).

Appellant's protest was sufficiently specific to provide notice of the grounds of its protest and included factual allegations. Specifically, Appellant asserted DMS JV did not have an approved mentor-protégé agreement when DMS JV submitted its proposal, and attached SBA's online listing of approved mentor-protégés, which did not contain DMS JV, to support its argument. While the Area Office ultimately found that DMS JV did have an approved mentor-protégé agreement (Fact 4), I note there is no requirement that a protest be accurate, but merely a requirement that the protestor explain the reasons for making the protest. *See Size Appeal of Emergency Beacon Corporation*, SBA No. SIZ-4813, at 12 (2006). Further, Appellant also made specific allegations that DMS did not qualify as a protégé because it failed to satisfy the requirements of 13 C.F.R. § 124.520(c), which is reviewable by the Area Office. *See Size Appeal of Lance Bailey and Associates, Inc.*, SBA No. SIZ-4788, at 10-11 (2006); *Size Appeal of Lance Bailey and Associates, Inc.*, SBA No. SIZ-4799 (2006). Accordingly, I conclude that Appellant's protest was sufficiently specific and the Area Office had the authority to render a size determination.

In passing, I note that the word "generally," as used in 13 C.F.R. § 124.520(b)(2), does not create a mandatory requirement that a mentor will have no more than one protégé at a time. However, other language in 13 C.F.R. § 124.520(b)(2) contains requirements SBA cannot waive. The Area Office should apply the precise language of 13 C.F.R. § 124.520(c), which lists the qualifications of protégé concerns (two of which are disjunctive), to the facts.

#### V. Conclusion

For the above reasons, I VACATE the Area Office's dismissal of Appellant's size protest and REMAND the case to the Area Office. The Area Office is ORDERED to perform a formal size determination in response to Appellant's protest.

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THOMAS B. PENDER  
Administrative Judge